QUESTIONS PRESENTED

1. It is undisputed that airports are authorized to charge a fee to aeronautical users of airport facilities to compensate the airport for the costs attributable to such users. The principal issue presented by this case and the primary focus of this brief is whether airport landing fees and terminal rents charged to airline tenants are unreasonable, when the methodology on which those fees are based does not take into account revenues generated by non-airline tenants, even though such charges to the airlines are no greater than the break-even costs to the airport for the facilities and space utilized.

2. Additionally, this case presents the issue of whether the Anti-Head Tax Act was intended by Congress to regulate the reasonableness of airport landing fees and terminal rents, and if it was, whether the Secretary of Transportation or the courts should, in the first instance, review the reasonableness of such charges.

3. Finally, the case presents the issue of whether, in light of Congress' regulation of the reasonableness of airport landing fees and terminal rents either under the Anti-Head Tax Act or the Airport and Airway Improvement Act, the courts should review the reasonableness of such fees under the dormant Commerce Clause.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-97

NORTHWEST AIRLINES, INC., *et al.*,
Petitioners,

v.

COUNTY OF KENT, MICHIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Airports Council International-North America (ACI-NA) represents the state, regional and local governing bodies that own and operate the principal airports served by scheduled air carriers in the United States, Canada and Bermuda. ACI-NA member airports handle approximately ninety percent of the domestic and international air passenger traffic in the United States.

ACI-NA submits this *amicus* brief in support of respondents, the County of Kent, Michigan, the Kent County Board of Aeronautics and the Kent County Department of Aeronautics (collectively, KCAB), because a correct resolution of this case is of vital importance to the national airport system and the local public entities charged with the responsibility of operating airports in the United States. At its heart, this case represents a challenge to the reasonableness of the methodology used in whole or in part by numerous airports, including 60 of the 100 largest U.S. airports, to determine the charges they levy on airlines for the use of airport facilities—the compensatory method.[1] Under that methodology, charges to airlines are based on the costs to the airport for the facilities and space the airlines use and airport operators assume the financial obligation and risk of building and operating the entire airport, including the obligation to fund major capital improvements. Funding for such improvements is partially based on retained revenues generated by the airport from non-airline concessions, such as parking lots, car rental companies, gift shops, advertising and food services.

A decision by this Court which accepts petitioner airlines' contention that the compensatory method of charging airlines is unreasonable, because it does not give the airlines the benefit of non-aeronautical concession revenues, would greatly impair the ability of the numerous airports which use the compensatory method to raise the revenues required for prudent airport management and development. This result would, therefore, adversely affect the financial structure presently used by many major airports and the ability of these airports to fund capital improvements and expansion projects desperately needed to properly serve the public.

[1] Airports Council International-North America, Survey of Ratemaking Utilized by 100 Largest U.S. Airports (1993).

Contrary to the airlines' contention, a methodology that takes concession revenues into account when establishing fees charged to the airlines for their use of airport facilities is not mandated by the Constitution, the Anti-Head Tax Act or this Court's decisions, and ACI-NA offers this brief in support of that position.[2]

STATEMENT OF THE CASE

As detailed in the opinions of the Courts below, airports generally use one of two methods in formulating the rates and fees they charge airline tenants for use of the airport—the compensatory method or the residual method (Pet. App. at 27a). Under the compensatory method, "the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them," (Pet. App. at 3a) and it is the airport that assumes the financial risk of assuring that the airport meets its financial obligations, including the responsibility for meeting operating costs and debt service obligations on debt issued to fund major capital projects. By contrast, "residual cost methods base the rates and fees on the total cost of operation of the airport" (Pet. App. at 27a) and the airlines agree to make up any revenue shortfalls not met by other airport revenue sources such as non-airline concessions.

[2] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

Similarly, a 1984 Congressional Budget Office (CBO) study on airport financing points out that:

> ". . . the airport/airline relationship at the nation's major commercial airports typically is based on one of two very different approaches with important implications for airport pricing and investment practices:
>
> **The residual cost approach**, under which the airlines collectively assume significant financial risk by agreeing to pay any costs of running the airport that are not allocated to other users or covered by non-airline sources of revenue; and
>
> **The compensatory approach**, under which the airport operator assumes the major financial risk of running the airport and charges the airlines fees and rental rates set so as to recover the actual costs of the facilities and services that they use." "Financing U.S. Airports in the 1980's", a Study prepared by the Congressional Budget Office 18-19. (April 1984) (emphasis in original).

In practice, the choice of approach used to establish airport fees and rates determines the amount of control the local airport operator, as opposed to the airline tenants, exercises over airport capital programs. Thus, under residual ratemaking, as noted in the CBO study, in exchange for the guarantee of successful airport financial performance, the airline tenants are often given a significant amount of control over air-

port capital investment decisions by the insertion of so-called "majority-in-interest" clauses in their leases.[3]

> "Majority-in-interest clauses give the airlines accounting for the majority of an airport's traffic the opportunity to review and approve or veto capital projects that would entail significant increases in the rates and fees airlines pay for the use of airport facilities." *Id.* at 25.

In contrast, under compensatory ratemaking:

> ". . . because total revenues are not constrained to the amount needed to break even, and because surplus revenues are not used to reduce airline rates and charges, compensatory airports may earn and retain a substantial surplus, which can later be used for capital development." *Id.* at 23.

The choice by an airport operator as to whether to use a compensatory or residual method is based on a carefully balanced weighing of the benefits and burdens of each in the context of local conditions, including the proprietary objectives of the airport operator. Additionally, although the compensatory method can be implemented unilaterally by the airport, the residual method requires airline agreement to guarantee the successful financial performance of the airport. At airports where there is a revenue shortfall being paid by the local community, the Airlines will not agree to a residual approach, since to

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[3] See Note, *The Anti-Trust Implications of Airport Lease Restrictions*, 104 Harv. L. Rev. 548 (1990), discussing the anti-competitive and restrictive nature of "majority-in-interest clauses."

do so would mean incurring obligations to pay fees and charges in excess of the airport costs incurred in connection with the facilities used by the Airlines.

As found in this case, KCAB utilizes the compensatory method under which "the Airlines are only charged for the land costs, physical facilities and other expenses which can be directly allocated to them," (Pet. App. at 3a) and it is the airport that assumes the financial risk of assuring that the airport meets its financial obligations including the responsibility for meeting operating costs and debt service obligations on bonds issued to fund major capital projects. The trial record also reveals that the charges to the airlines equaled 43.3% in 1987 and 40.6% in 1988 of the total airport expenses. (*Id.* at 37a). Additionally, it is undisputed that the agreed to "rates and fees charged plaintiffs represented only 1.2% of the airlines' revenues generated at the Airport in 1988" and if the challenged rates had been applied by KCAB, "the airlines' payments would have equalled 1.5% of the revenues generated." (*Id.*)

After a bench trial, the district court issued a decision upholding the reasonableness of the fees charged to the airlines in all critical respects. The district court found, with regard to the landing fees and terminal rental charges which are at issue here, that the airline "plaintiffs were charged the break-even costs for the areas they use" and that the Airport "is not generating any of its surplus revenues from rates and fees charged plaintiffs." (Pet. App. at 37a). Accordingly, the district court held that "the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates." (*Id.*) The

Court of Appeals did not disturb this determination. (Pet. App. at 9a). In fact, that court explicitly rejected the airlines' argument that the overall rates and fees were unreasonable because they generated a substantial profit for the airport. In so holding, the court rejected the reasoning of *Indianapolis Airport Authority* v. *American Airlines, Inc.*, 733 F.2d 1262 (1984), in which the Seventh Circuit determined that a methodology which disregards airport concession revenues when assessing fees charged to the airlines is unreasonable under the Anti-Head Tax Act, 49 U.S.C. App. 1513 ("AHTA"). Rather, the Court of Appeals found persuasive the reasoning of the district court in *City and County of Denver* v. *Continental Airlines, Inc.* 712 F. Supp. 834 (D. Col. 1989), which held that the AHTA does not apply to airport fees charged to concessions and that the airlines have no right to have their fees and charges reduced to reflect concession revenues received by the Airport.[4]

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[4] The district court concluded that the fees charged to the petitioners were reasonable with the exception of the overnight parking fee. Unlike the remainder of charges to the airlines which cover only costs, the court found that the airport overnight parking fee exceeded costs. (Pet. App. at 38a). The airport did not appeal the overnight parking fee portion of the district court's decision and the correctness of such decision is not before this Court.

The court of appeals affirmed the district court's judgment that the fees charged to the airlines were reasonable with the sole exception of the airport's allocation of 100% of the costs of crash, fire and rescue (CFR) expenses to the commercial airlines. The Court of Appeals found that such facilities serve general aviation and concession users as well (Pet. App. at 14a) and, therefore, it was unreasonable not to allocate some of the CFR costs to those users. The airport has not sought to have this Court review the CFR issue.

SUMMARY OF ARGUMENT

Since 1946, Congress, in exchange for federal funding, has required commercial airports to give written assurances "satisfactory to the Secretary" of Transportation (or predecessor) that they would make "the airport available for public use on fair and reasonable terms and without unjust discrimination", 49 U.S.C. 1110 (1946), now 49 U.S.C. App. 2210(a)(1). Consequently, the Secretary, not the courts, is charged with the responsibility of overseeing the reasonableness of airport charges. In 1973, in enacting the AHTA, Congress merely sought to prohibit "head taxes" and the reference in the statute to "reasonable" airport fees simply was intended to restate current law and clarify what is not prohibited. In short, the AHTA was not intended to create a new and different judicially enforceable requirement with regard to airport aeronautical user fees.

Furthermore, there is no need for Commerce Clause review of airport aeronautical user fees since Congress has delegated to the Secretary of Transportation responsibility for ensuring that such fees are reasonable and nondiscriminatory.

If, however, this Court determines that it is proper for the federal courts to review the reasonableness of airport aeronautical fees under the AHTA and/or the Commerce Clause, it is evident that the landing fees and terminal rental charges being challenged here are in all respects valid. It is undisputed that in formulating rates and fees for its airport tenants, KCAB, since 1968, has used the compensatory method (Pet. App. at 27a). The airline petitioners argued below that in order for their landing fees and terminal rental

charges to be "reasonable" in compliance with federal law, "KCAB must cross credit the concession revenues when establishing [their] rates and fees." (Pet. App. at 31a). As the district court noted "[t]his contention by [the airlines] would essentially require the Airport to share the surplus revenues from non-airline users with [them]." (*Id.*) The airlines make an identical argument before this Court. (Br. at 27). Additionally, the airlines argue that the airport unfairly allocates to the airlines a disproportionate share of the airside costs and overcharges the concessions and ultimately airline passengers for the cost of providing concessions. (Br. at 23-26).

Stripped to its bare essentials, the airlines' argument is based on the faulty premise that they are entitled to share in the benefits provided to the airport operator by surplus concession revenue without sharing in any of the burdens, such as the assumption of the risk that the airport will remain financially successful. The Airlines' argument finds no support in either the AHTA or in the Commerce Clause. In fact, it is undisputed that Congress has not preempted the authority of airport operators to assess airport fees and that neither the AHTA nor the Commerce Clause requires that any particular type of ratemaking be used when computing airport user fees. Therefore, if the federal courts have the authority, in the first instance, to review the validity of such charges, such review, under either the AHTA or the Commerce Clause, would be based on essentially one identical and exceedingly narrow standard—the standard of "reasonableness."

It is ACI-NA's position that the fee structure used by KCAB, which is similar to the structure used by

numerous other airports, including 60 of the 100 largest U.S. airports, is patently reasonable. A contrary conclusion would require a drastic restructuring of the financial relationships between airports and airlines at numerous airports throughout the country and would result in a decision which, contrary to Congressional intent embodied in the airport development legislation, would cripple the ability of airports to finance needed capital development.

ARGUMENT

I. REVIEW OF THE REASONABLENESS OF AIRLINE CHARGES IS VESTED, IN THE FIRST INSTANCE, IN THE SECRETARY OF TRANSPORTATION, AND NOT THE COURTS.

This brief is primarily devoted to demonstrating that the compensatory method is a reasonable way to compute the fees and charges to airlines for use of an airport. However, ACI-NA also asserts that neither the AHTA nor the Commerce Clause vest the courts with jurisdiction to review, in the first instance, the reasonableness of airport charges.

Since 1946, Congress has required that airports, as a condition for the receipt of federal funds, give written assurances "satisfactory to the Secretary" of Transportation (or predecessor), that they would make "the airport . . . available for public use on fair and reasonable terms and without unjust discrimination." 49 U.S.C. 1110(1) (1946), now, 49 U.S.C. App. 2210(a)(1). Moreover, in 1970, Congress added the requirement that the airport operator will maintain a fee and rental structure ". . .which will make the airport as self-sustaining as possible . . . ." 49 U.S.C.

1718(8)(1970), now 49 U.S.C. App. 2210(a)(9). These assurances are enforced by the Secretary of Transportation through a comprehensive administrative scheme which insures that complaints of violations are adjudicated in a uniform manner consistent with Congressional policy favoring a uniform regulatory system for the national aviation system. See *New England Legal Foundation* v. *Massachusetts Port Authority*, 833 F.2d 157, 172 (1st Cir. 1989); 49 U.S.C. App. 2210(b), 2218(a); 14 C.F.R. Part 13 (1993). Thus, initial review of the validity under federal law of airport fees has been delegated by Congress to the Department of Transportation as part of its administration of all federal aviation statutes, including those statutes which govern national planning and federal funding of airports. "[V]irtually all the Nation's airports serving commercial airlines have development projects that implicate the[se] requirements." (Brief of the United States as *Amicus Curiae* In Opposition to Petition for Writ of Certiorari (U.S. Br. in Op.) at 15, n.11).

In 1973, as part of the Airport Development Acceleration Act, Congress passed the AHTA. 49 U.S.C. App. 1513. The plain language of the AHTA prohibits only certain types of fees and charges, namely a "tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce . . . ." Other charges, including those levied by states or political subdivisions as compensation for use of airport facilities (such as the ones involved here) were carefully carved out of the prohibition. See, *Aloha Airlines* v. *Director of Taxation of Hawaii*, 464 U.S. 7, 12, n.6 (1983). In fact, the aims of the AHTA were clearly set forth by Congress in the statutory lan-

guage and defined in the legislative history, which demonstrates that Congress intended to prohibit states and their political subdivisions from imposing "head taxes" and in no manner modified the authority previously delegated to the Secretary of Transportation to regulate the reasonableness of airport user fees through its enforcement of the grant assurances in the aviation statutes. See S. Rep. 93-12, *reprinted in* 1973 U.S. Code Cong. & Admin. News at 1446 (Congress viewed head taxes as a "new, inequitable, and potentially chaotic burden of taxation of the nearly 200 million persons who use air transportation each year.") While subsection (b) of the AHTA refers to "reasonable" user fees, such reference simply clarifies what is not a "head tax" by restating the standard for such fees previously set forth in the aviation statutes and by this Court in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972). In, *New England Legal Foundation* v. *Massachusetts Port Authority*, 883 F.2d 157, 170 (1st Cir. 1989), the First Circuit sustained a determination by the Secretary of Transportation that challenged landing fees were not a "head tax" in form or substance and, therefore, the AHTA had no applicability to such charges. In short, there is absolutely no reason to believe that Congress intended the AHTA to create an additional substantive limitation on aeronautical user fees to be enforced by the courts.

Consequently, the AHTA does not provide any basis for the federal courts to review, in the first instance, the reasonableness of airport fees because Congress has expressed its intent to place that function in the hands of the Secretary of Transportation. Therefore, this Court should find that either the AHTA does not

regulate the reasonableness of airport user fees or that the Airlines have no private right of action under the AHTA to make such a challenge. (U.S. Br. in Op. at p. 9, arguing that there is no implied private right of action under the AHTA).

Similarly, there is no reason to trigger review by the courts of airport aeronautical user fees under the dormant Commerce Clause. When, as is the case here, Congress has stated that airport aeronautical user fees are permissible, as long as they are reasonable and non-discriminatory, and has provided an administrative mechanism for review of such fees, "Congress has struck the balance it deems appropriate [and] the courts are no longer needed to prevent States from burdening commerce" in this area. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982) ("Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause.")

II. THE AIRPORT FEES AT ISSUE HERE ARE REASONABLE.

A. *Evansville Provides The Standard For Review In This Case.*

Turning to the issue of whether the KCAB fees under review here are "reasonable", ACI-NA and the airline petitioners start on common ground. The airline petitioners assert that "the *Evansville* standard should serve as the baseline against which to measure the reasonableness of fees under §1513(b) [of the AHTA]." (Br. at 22). ACI-NA agrees. As set forth above, it is ACI-NA's position that it is the Secretary of Transportation, not the courts, who has initial jurisdiction to review these fees. However, if this Court should determine that such jurisdiction is vested in

the courts under the AHTA or the Commerce Clause, ACI-NA submits that such review is circumscribed by the highly deferential standard of review set forth in *Evansville*.

Congress enacted the AHTA in direct response to *Evansville*. In that case, this Court determined that a local "head tax" imposed directly on airline passengers to help support airport facilities "impose[d] valid charges on the use of airport facilities constructed and maintained with public funds" and, therefore, did not violate the Constitution, including the Commerce Clause. 405 U.S. at 720. In so holding this Court applied the familiar and well-established standard used to judge the reasonableness of user fees on publicly owned facilities in interstate commerce which recognizes that the "States are empowered to develop 'uniform, fair and practical' standards for this type of fee." (*Id.* at 715.)

After *Evansville*, Congress ". . .concluded that the proliferation of local [head] taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers." (*Aloha*, 464 U.S. at 9) (footnote omitted). Congress' answer to these problems was the AHTA. However, while "Congress passed §1513(a) [of the AHTA] to deal primarily with local head taxes on airline passengers . . ." (*Id.* at 13), it plainly did not include in its preemptive sweep every charge imposed by airports for use of airport facilities. In fact, Section 1513(b), "clarifie[d] congress' view that the States are still free to impose on the airlines and air carriers 'taxes [or charges] other than those enumerated in subsection (a).' " (*Aloha*, 464 U.S. at 12 n.6). For aeronautical user charges, it simply restated the then

existing requirement in the Airport and Airway Development Act of 1970 (49 U.S.C. §1718(1)), that they should be "reasonable". There is no reason, therefore, to conclude that by passage of the AHTA, Congress intended that airport user fees would be reviewed under any different standard from that applied to such fees in *Evansville*. As stated in *Evansville*:

> "[W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself. . . ." 405 U.S. at 712-713.

Evansville goes on to provide that so long as the charge

> "is based on some fair approximation of use or privilege for use . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." (*Id.* at 716-717).

In dealing with assertions that the fee is excessive in relation to the cost, states are not held to "a punctilio of proof" and are "not required to compute with mathematical precision the cost to it of the services necessitated by the . . . [airport] traffic." *American Airlines, Inc.* v. *Massachusetts Port Authority*, 560 F.2d 1036, 1039 (1st Cir. 1977), *quoting, Clark*

v. *Paul Gray Inc.*, 306 U.S. 583, 599 (1939). Similarly, the policy of the Secretary of Transportation is that "airports are given wide latitude in selecting a particular rate methodology and fee structure." (U.S. Br. in Op. at 8). Measured against the applicable deferential standard set forth above, it is evident that the fees involved here clearly pass muster.

B. *The Evansville Reasonableness Standard Is Plainly Satisfied Here.*

Here, there can be no doubt that the fees charged the airlines by KCAB are "based on some fair approximation of use or privilege for use" (*Id.* at 716-717) and are not excessive since, as found by the district court, the airlines are charged only for "the break-even costs for the areas they use" (Pet. App. at 37a)—the runways they utilize and the terminal facilities they occupy. As at most airports around the country, landing fees are based on aircraft weight and terminal rents are based on square footage of actual use and a proportionate share of public space. (Pet. App. at 28a). Airport space which the airlines do not use results in no charge to them. In fact, KCAB does not charge them for some areas of the airport the airlines do use, such as parking areas used by airline employees, and roped off space in front of airline ticket counters. (*Id.*) As the district court found "[i]t is clear . . . that *the Airport is charging plaintiffs only for their share of the operating expenses* and is not generating any of its surplus revenues from rates and fees charged plaintiffs." (Pet. App. at 37a) (emphasis supplied). Based on this finding, the airlines can only prevail if federal law mandates that airlines be given access to airports at a charge *less* than the cost of the facilities and space they utilize. Plainly

this is not the law and the standard of reasonableness is satisfied where, as here, the airlines are charged "only for their share of the operating expenses." (*Id.*)

In fact, the airlines challenge to these fees is no more than a direct attack on the compensatory method, utilized by numerous publicly operated airports throughout the country, including 60 of the 100 largest U.S. airports. What the airlines overlook, however, is that the *Evansville* standard does not require that a state adopt any particular formula when computing user fees. The airlines attempt to support their argument by focusing on the surplus revenues which KCAB has been able to retain.[5] This surplus, however, is derived not from the Airlines but rather from non-aeronautical users, principally fees generated by concessions and the parking lot. (Pet. App. at 28a). Therefore, the airlines' argument amounts to no more than an erroneous assertion that the compensatory method is flawed because it does not give the airlines a credit for surplus concession revenues.

The airlines further argue that the fees they pay should reflect non-airline revenues because airline pas-

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[5] The district court found that at the end of 1989, KCAB had reserves of over nine million dollars. (Pet. App. at 30a). The airlines attempt to attach some improper purpose to KCAB's retention of the surplus, characterizing it as a financial windfall. (Br. at 33). The airlines' argument totally ignores the fact that Congress is aware of the profitability of some airports and has provided, with certain very limited exceptions, that such funds will be used only to defray the costs of airport operations and development. In the grant assurance provisions added by the Airport and Airway Improvement Act of 1932, P.L. No. 97-248, 96 Stat. 671, codified at 49 U.S.C. App. 2210(a)(12), Congress generally restricted the use of such revenues to "the capital and operating costs of the airport . . ."

sengers are paying those fees in addition to absorbing the fees charged to the concessions. (Br. at 32). This "*total* cost of travel", they reason, will "lead to a decline in air travel and a corresponding decline in Airline revenues." (*Id.*) (emphasis in original). Assuming, contrary to the holding by the Sixth Circuit, that the airlines have standing to assert the claims of non-airline as well as of airline customers, (Pet. App. at 8a) ACI-NA submits that this contention finds no support in the AHTA or in the facts of this case. The airlines would essentially turn the courts into public utility commissions sitting in judgment over the impact on airline revenues and air travel of an entire airport fee structure.[6]

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[6] The airlines erroneously attempt to blame the charges imposed upon them by airports generally, and in particular at KCAB, for all of their well-publicized fiscal problems. This, perhaps, is the most ludicrous of all of the airlines contentions. Whatever may be the cause of the fiscal condition of airlines, it is certainly not airport charges. The District Court found that here the rates under the challenged ordinance would amount to 1.5% of the revenues generated by the airlines at the Airport, and the previously agreed-to rates would amount to 1.2% of those revenues. (Pet. App. at 37a) Thus, the new fees will result in an increase of only three-tenths of one percent of the airlines' airport-related revenues. Moreover, Airport charges have consistently remained a small percentage of the overall operating costs of airlines. A study undertaken by ACI-NA concluded that "on average for the U.S. Airline Industry, approximately 4% of total airline costs are paid for airport rents, fees and charges." Other costs, such as travel agent commissions and labor related costs, account for a far greater percentage of airline operating expenses. "Airport Costs and the U.S. Airline Industry", prepared by ACI-NA at 14. (1993).

Due to the problems in the airline industry, the President proposed, and Congress approved, creation of "The National Commission to Ensure a Strong Competitive Airline Industry" which was given the mandate "to investigate, study and make policy recommendations . . . concerning the financial health and future competitiveness of the U.S. airline and aerospace industries." National Commission to Ensure a Strong Competitive Airline Industry, *Change, Challenge* and *Competition: A Report to the President and Congress* (August, 1993). Despite the Commission's detailed report, delving into the numerous causes of the financial problems of the airline industry, there is absolutely no suggestion that airport charges have in any way caused or contributed to the airlines' financial problems. Consequently, it is evident that the airlines' claims that airport charges in general, and the charges at KCAB in particular, are a cause of their financial difficulties are patently erroneous.

Under the compensatory method, it is the local airport operator as landlord that has undertaken the risks and made the capital investments necessary to build the airport, and which is responsible for continuing to collect airport revenue sufficient to operate and make the capital improvements required to maintain and improve the airport for the benefit of the public. While airlines that lease space in airports using the residual method receive a credit for non-aeronautical revenues, these airlines also share in the financial burdens of airport operation and development by guaranteeing the successful financial performance of those airports. Here, the airlines would force KCAB, and airports in general, to give the airlines the benefit of concession revenues without forcing them to also assume the burdens—the financial risks inherent in the operation and capital development of the airport.

Finally, the airline petitioners would have this court believe that unless they prevail in this litigation air-

port operators will "create enormous Airport surpluses" having no legitimate purpose. (Br. at 4). This completely overlooks the fact that almost all major airports, such as Kent County International Airport, are managed by a board of directors or commissioners, such as the KCAB, the members of which are public officials statutorily charged with the responsibility of providing and operating airport facilities for the benefit of the public. The restraints on the expenditure of airport funds for an airport board are the same as for any other public body which operates for the benefit of the public. Their decisions are reviewable both politically and in the State Courts.

C. *The AHTA Does Not Apply to Concession Revenues.*

The courts below were also clearly correct when they held that the AHTA does not regulate fees charged to concessions and, therefore, airports are simply not required to take those revenues into account or give the airlines a credit for those revenues when establishing airline fees. The airlines' argument to the contrary finds no support in the language of the AHTA or its legislative history.

The only mention of airport user charges in the AHTA is in Section 1513(b), which explicitly *permits* airports to collect "reasonable rental charges, landing fees, and other services from *aircraft operators* for the use of airport facilities." (emphasis supplied.) Therefore, the plain wording of the AHTA does not purport to apply to concession revenues. In point of fact, a difference in the treatment of concession fees and airline charges in the AHTA reflects the difference in the very nature of the respective uses. "Per-

sons affected by the rates, rental and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers." Furthermore, passengers *must* make "use of the airport's runways, taxiways and airline portions of the terminal area", but a passenger *is not* required to make use of concessions. (*Denver*, 712 F. Supp. at 838-839). In other words, unlike the use of aeronautical services where "the air passenger is captive and her purse is necessarily and directly affected by . . . [airport] charges to the airlines," the use of concessions is determined "by individual decisions driven by individual perceptions of need and economic values." (*Id.* at 839).

Indeed, the issues the airlines would have the federal courts resolve in this case—choices between different theories of ratemaking relating to concession revenues and cost allocations—are complicated, fact-bound issues. It is inconceivable that Congress, which prescribed *absolutely no guidelines* in the AHTA for such inquiries, other than one of "reasonableness", intended the courts to use that statute as a springboard to place themselves in the role of a regulatory agency responsible for developing regulatory standards with regard to ratemaking.[7]

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[7] In *Indianapolis Airport Authority* v. *American Airlines, Inc.*, 733 F.2d at 1268, the Seventh Circuit, reviewing the airport fee structure at Indianapolis International Airport, held that when concession fees, which are ultimately paid by the passengers, are added to airline user fees, "the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers and is therefore unreasonable under the state and federal statutes." As noted above, this approach finds absolutely no support in the AHTA which the Court

There is nothing in the legislative history of the AHTA which indicates that Congress intended that airport operators take concession revenues into account when establishing airline fees. In fact, quite to the contrary, there is evidence that Congress took into account the importance of concession revenues to airports when it considered the AHTA's impact on airport financing. "Congress recognized concession revenues as an important source of airport capital funding since federal government grant money does not finance 100% of any 'airport development project.' " (*Denver*, 712 F.Supp. at 837). In a Senate Report, it was noted that:

> "Local governments are increasingly unable to finance airport improvements. . . The airport operators testified that charges on concessionaires have been increased to about their maximum limits.

purportedly applied. Moreover, the Seventh Circuit, erroneously assuming that "[n]o agency has regulatory authority over the rate practices" of that airport, explicitly placed itself in the role of a regulatory agency and relied on its interpretation of relevant "public utility regulation." (*Id.*) We submit that in adopting this approach, the Court assumed the role of a legislator rather than interpreter of the law as written by Congress. As Judge Nelson of the Sixth Circuit stated in his opinion affirming the judgment of the district court in this case, "[r]ate-making, including the cost-allocation component of rate making, 'is essentially a legislative function.' " (Pet. App. at 22a, *quoting*, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 589 (1945)). In the absence of any statutory standards other than the standard of reasonableness, it is simply inappropriate for a court, as the Seventh Circuit did in *Indianapolis*, to "imagine [itself] in the role of a regulatory agency" (*Id.*) and pick and choose the regulatory standards it deems appropriate for airport rate-making.

> The remainder must be obtained from airline and other users of airport facilities, including concessionaires, or be absorbed by the parent local government through subsidy." S. Rep. No. 12, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Admin. News 1434, 1439.

Moreover, when Congress apportioned additional federal funds to smaller airports in the same legislative package that enacted the AHTA, Congress, in reliance on large airports' ability to raise capital by the accumulation of concession revenues, decided not to increase funds for such airports.

> ". . . we have heard no evidence indicating that the nation's 22 largest airports, the so-called large hubs, have experienced financial difficulty resulting in failure to participate in the [Airport Development Aid Program]. On the contrary, the large hubs appear for the most part to be self-sustaining. *In many cases these airports are actually profitable. Fees paid by the airlines for landing and for space rental and fees obtained from concessionaires for parking, restaurants, shops, etc., are adequate to cover both the operational expenses of the airports and to underwrite the capital investment borrowing required.*" S. Rep. No. 12, 93d Cong., 1st Sess., *reprinted in* 1973 U.S.Code Cong. & Admin. News 1434, 1440. (emphasis supplied).

Additionally, federal policy in effect since 1970 has explicitly required that airports receiving federal funds agree to "make the airport as self-sustaining as pos-

sible under the circumstances existing at that particular airport . . . ." 49 U.S.C. App. 2210(a)(9). It is through retained earnings from concessions that compensatory airports are able to remain self-sustaining and fund projects for airport development without subsidies from local taxpayers.

The airlines' unsubstantiated claim that airports generate enormous financial profits is simply untrue. In reality, airport surpluses are modest when compared to future capital needs. Moreover, surpluses, or more properly retained earnings, are necessary to an airport's credit standing since they are one of the factors assessed by bond rating agencies and investors in evaluating the security and, therefore, marketability of an airport's bonds. In the financing of airport capital improvements by the issuance of revenue bonds, it is not only customary, but mandatory that a "coverage" in excess of operating and debt service cost be generated each year, both as a test of compliance with bond covenants and as a necessity for the issuance of additional parity debt. Furthermore, any retained earnings that an airport may generate from its non-aeronautical operations are, in accordance with federal grant assurances, retained by the public airport operator and used for capital development that will benefit all airport users, not just the airlines.[8]

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[8] The Air Transport Association, based on a misreading of an American Association of Airport Executives Survey of Airport Rates and Charges 1991-92, alleges that airports have substantial "surplus revenues in excess of [their] operating costs". (Brief of Air Transport Association of America as *Amicus Curiae* in Support of Petitioners at 8). The figures cited by the ATA, in point of fact, do not represent airport surpluses in that they exclude other costs appropriately incurred by airport operators, such as general administration and, more significantly, depreciation and interest costs incurred to support the huge infrastructure investments in airside, landside and terminal facilities. Ironically, one of the airports cited as having an excessive surplus, Seattle Tacoma International Airport (*Id.* at 9) is a residual airport where the airlines have by agreement consented to any revenue retention by the Airport.

The public bodies charged with the responsibility of providing airport facilities and operating an airport for the general public must, as with any enterprise, be permitted to invest for future expansions and improvements. To successfully operate and develop an airport one must constantly plan for the future. In addition, it is essential that airports be permitted to accumulate reserves for such things as the provision of matching funds for federal grants and unforeseen contingencies. It clearly is not prudent management for an airport, which bears the financial risk of the success of the airport, to currently spend every dollar it receives. *Evansville* acknowledges this, stating that charges must reflect a "fair, if imperfect, approximation of the use of facilities for whose benefit they *are* imposed."[9] 405 U.S. at 717 (emphasis supplied).

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[9] Petitioners refer to *Evansville* for the misleading proposition that an airport may only impose rates to generate sufficient funds to cover current and past deficits. (Br. at 12). The reference properly reads, "The respondents in No. 70-99 have advanced no evidence that a $1 boarding fee, if permitted to go into effect, would do more than meet these past, as well as current, deficits." 405 U.S. at 720. In fact, the fees which the Court upheld as "reasonable" in *Evansville* were moneys held by the Authority "in a separate fund for the purpose of defraying the *present and future costs* incurred by the Airport Authority in the construction, improvement, equipment, and maintenance of the Airport and its facilities for the continued

D. *Congress Recognizes The Tremendous Capital Needs Of Airports.*

Rather than restricting the revenues which airports can receive, as the airlines would have this Court do, Congress recently determined that airport revenues must be expanded. The enormous growth in the number of air travelers following airline deregulation has led to greater congestion at airports, thus increasing the need for capital improvements to increase airport capacity. Responding to these needs, Congress enacted the Aviation Safety and Capacity Expansion Act of 1990, P.L. 101-508, which amended the AHTA to permit airport operators to impose passenger facility charges ("PFCs") to help defray the costs of airport development programs. The House Report proclaimed the urgency of the problem:

> "The bill reported by the Committee, the Aviation Safety and Capacity Expansion Act of 1990, establishes a comprehensive program to develop our nation's aviation system to meet the needs of the 1990s.
>
> There is an urgent need for this legislation. Our airport and airway systems are now inadequate to handle the demands they face. If we do not act promptly to expand the capacity of the system, congestion will get much worse.
>
> * * *
>
> Extensive capital development will be required to overcome these problems. A study by airport associations, which is generally accepted by the Department of Transportation, concludes that airport capital development needs will total $10 billion a year during the next 5 years. In addition, modernization of the nation's air traffic control system is estimated to cost approximately $13.5 billion through 1995. Meeting these needs will require massive combined effort on the federal and local levels. The Aviation Safety and Capacity Expansion Act creates the framework under which the necessary development can be accomplished."[10] H. Rep. No. 581, 101st Cong., 2d Sess. (1990) at 11.

The House Report also noted:

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use and future enjoyment by all users thereof." *Id.* at 709. (emphasis added). Such language expressly acknowledges that it is not unreasonable for an airport to generate revenues in excess of the current deficit.

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[10] In the same legislation, Congress authorized federal Airport Improvement Program grants of $1.8 billion for fiscal year 1991 and $1.9 billion for fiscal year 1992 (H. Rep. No. 581, 101st Cong., 2d Sess. (1990) at 16) recognizing that, with $10 billion in annual capital development needs through non-federal sources.

The chairman of the House Public Works and Transportation Committee, the authorizing committee responsible for aviation legislation, summed up the point during the floor debate on the 1990 bill:

> "We have reached a point in the development of our air transportation system where we need to enable all levels of government, Federal, State, and local, to do everything they can to finance infrastructure improvements at the Nation's airports.
>
> Federal funding alone will not be sufficient to meet the needs for airport development."

136 Cong. Rec. H. 6293 (daily ed. Aug. 2, 1990) (remarks of Rep. Anderson).

> "In view of the extensive capital development which airports must undertake, the Committee believes that it is appropriate to authorize a new local source of funding, a passenger facility charge. *A new source is needed because of the increased needs for airport development. A new source is also needed because at some airports the incumbent airlines have the power to stop or delay needed capital development, and may exercise these powers when they are having financial problems or when development of an airport would facilitate new airline competition. Id.* at 14 (emphasis supplied).

Consequently, a decision that airports using the compensatory method must use revenues generated by concessions to reduce the fees charged to airlines below the cost of providing the facilities and services they use would run counter to Congress' intent, evident in the AHTA as amended by the Aviation Safety and Capacity Act of 1990, that existing sources of airport capital funding, such as concession revenues and federal aid, must be expanded rather than restricted.

In short, the compensatory method, which results in the airlines being charged for the costs of the airport facilities and space they use, more than satisfies the standard of reasonableness established by this Court in *Evansville*.

CONCLUSION

For these reasons, the court should affirm the judgment of the court below dismissing the airlines' challenge to the reasonableness of the landing fees and

terminal rental charges levied by the KCAB on the airlines.

Respectfully submitted,

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ADDENDUM

CONSTITUTIONAL AND STATUTORY ADDENDUM

The Commerce Clause of the United States Constitution, Art.1, §8, Cl. 3:

> "The Congress shall have Power . . . to regulate Commerce . . . among the several states . . . ."

The Anti-Head Tax Act, 49 U.S.C. App. §1513:

> "(a) Prohibition; exemption
>
> No State or (political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom . . . .
>
> (b) Permissible State taxes and fees
>
> [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section . . . and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities."

49 U.S.C. §2210

> "(a) Sponsorship. As a condition precedent to approval of an airport development project contained in a project grant application submitted under this title, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—
>
> (1) the airport to which the project relates will

be available for public use on fair and reasonable terms and without unjust discrimination . . .;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . .;

(12) all revenues generated by the airport, if it is a public airport . . . will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned and operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property . . .;

(b) Compliance. To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this title, as the Secretary considers necessary. Among other steps to insure such compliance, the Secretary is authorized to enter into contracts with public agencies on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, the Secretary is authorized to relieve the sponsor from any contractual obligation entered into under this title, the Airport and Airway Development Act of 1970, or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent the Secretary finds that space no longer required. . . ."

49 U.S.C. App. §2218:

"(a) General rule. The Secretary is empowered to perform such acts, to conduct such investigations and public hearings, to issue and amend such orders, and to make and amend such regulations and procedures, pursuant to and consistent with the provisions of this chapter, as the Secretary considers necessary to carry out the provisions of, and to exercise and perform the Secretary's powers and duties, under this chapter."